IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/07/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL No.486 OF 1991

1. Mahaboob Subbukani Beevi (died)
2. M. Abdul Salam
3. A. Jaffar Sathiq
4. A. Syed Ali
5. A. Abdul Sameed
(Appellants 2 to 5 brought on record
as Lrs. Vide Order dated 3.10.2002
in CMPs. 12701 to 12703.2002) .. Appellants

-Vs-

1. Hameed Bathumma Beevi
2. Kothar Sali Beevi
3. Hameed Salma Beevi
4. Shajhul Hammed
5. Peer Mohamed
6. P.M. Pakkir Mohideen
7. suhara alias Chellammal .. Respondents

Second Appeal preferred under Section 100 C.P.C., praying for the
relief as stated therein.

For appellants : Mr. M.M.Sundaresh

For respondents : Mr. Meerasabhib - R3

:JUDGMENT
This Second Appeal is preferred against the judgment and
decree dated 4.10.1989 made in A.S.No.90 of 1987 by the Court of I Additional
District Judge, Tirunelveli, thereby confirming the judgment and decree dated
9.1.1987 made in O.S.No.57 of 1984 by the Court of Principal Subordinate
Judge, Tirunelveli.

2. Tracing the history of the above second appeal coming to
be preferred by the plaintiff in the suit, it comes to be known that the
plaintiff/first appellant has filed the suit for partition of the schedule
property by metes and bounds and allot 43/144 shares and put her in separate
possession and order the mesne profits on averments such as that the suit
property originally belonged to one Kader Mydeen Masthan Adam Rowther; that he

was in possession and enjoyment of the same till his lifetime; that he died intestate on 25.11.1961 leaving one Khadar Mohidden Rowther, his younger brother, the defendants 1 and 2, his sisters, his wife and children the plaintiff and defendants 3 and 4, as his heirs and they were in joint enjoyment of the suit property; that in law, on the death of her father, the plaintiff became entitled to 2/9 shares in the schedule of property; that the plaintiff is now entitled to 19/72 shares after her mother's death; that K.M. Kadar Mohideen Rowther's 5/48 shares in the schedule of properties were sold in court auction to one Abdul Rahim, husband of the 3rd defendant and then he sold his undivided 5/48 shares to the plaintiff and the defendants 3 and 4 on 6.1.1982, 13.1.1982 and 31.1.1982 under three sale deeds and therefore, the plaintiff is entitled to undivided 5/144 shares apart from her share; that as a whole, the plaintiff is entitled to 43/144 shares in the suit schedule property; that the plaintiff finds it difficult to be in joint possession and hence she prays for partition and separate possession of the suit property.

3. On the contrary, while other defendants remained ex parte, the 4th defendant in his written statement would admit that the properties originally belonged to Kader Mohideen Masthan Rowther and that he died on 25.11.61 leaving behind the parties to the suit and one Kader Mohideen Rowther and his widow Suharal Beevi. This defendant would also admit the share of the plaintiff and the defendants 3 and 4 and further admits that the plaintiff is entitled to 43/144 shares in the suit schedule properties and would claim that he is entitled to 43/14 4 shares. He would further plead that the plaintiff never demanded for partition; that for the business run by late Kader Mohideen Rowther and late Suharal Beevi, they have borrowed Rs.30,000/- from one Arunagiri Nadar and the suit property was mortgaged by the defendants 1 to 4; that the said Arunagiri Nadar filed a suit in O.S. No. 368 of 1 978 and got a decree; that this defendant requested the plaintiff and other defendants to contribute to the mortgage debt but they refused; that the plaintiff as a legal heir and as a purchaser is liable to contribute for the mortgage debt; that the plaintiff is not entitled to get a decree without paying the mortgage debt. On such averments, the defendants would also pray for partition of the suit property and to direct the plaintiff to contribute towards the mortgage decree.

4. On such pleading by parties, the lower court having framed the following issues for determination of the questions involved in the suit, viz., (i) Whether the plaintiff is entitled to 43/144 shares in the suit properties? (ii) Whether the plaintiff is liable to pay towards the mortgage decree debt? and (iii) To what relief, if any, is the plaintiff entitled to?, had allowed the parties to record their evidence conducting the trial, during which the plaintiff on her side, would mark by consent, 5 documents as Exs.A.1 to A.5 in support of her case, for documentary evidence. On the part of the defendants, would mark one document as Ex. B.1 in support of their case, for documentary evidence. No oral evidence has been let in by any of the parties to the contest.

5. Learned Subordinate Judge, Tirunelveli, having traced the facts and circumstances of the case as pleaded by parties, having framed the issues brought forth above and having appreciated the same in evidence, issue wise, had ultimately decreed the suit, without costs. However, the trial Court has imposed a condition that the plaintiff should discharge 11/144

shares of the mortgage debt in favour of the said Arunagiri Nadar. Aggrieved by the said judgment, the plaintiff has preferred an appeal in A.S.No.90 of 1987 before the Court of I Additional District Judge, Tirunelveli and the said Court also tracing the facts as pleaded before the trial court and framing the points as below, (i) Whether the plaintiff is liable to pay towards the mortgage decree debt? and (ii) To what relief, if any, is the plaintiff entitled to?, and appreciating the oral and documentary evidence placed on record, would dismiss the appeal, with costs, thereby confirming the judgment of the lower court, as per its judgment dated 4.10.1989.

6. It is only against the judgment delivered by the first appellate court, the plaintiff, who is the appellant in the first appellate court has come forward to prefer the above second appeal on certain grounds as brought forth in the grounds of second appeal for determination of the following substantial questions of law:-

(i) Have not the Courts below committed an error of law in not holding that the parties are estopped from subjecting the plaintiff's share liable for discharge of proportionate mortgage debt?

(ii) Have not the Courts below committed an error of law in failing to hold that the mortgage decree-holder is prevented from claiming any share in respect of the decree amount by the principle of res judicata in view of the decree in O.S. No. 368 of 1978 and omission to include the plaintiff's share in E.P. No. 154 of 1987?

7. During arguments, the learned counsel appearing on behalf of the appellant/plaintiff would submit that it is the suit for partition and the same has been decreed in part and regarding the share claimed by parties, there is no serious dispute; that the dispute is regarding the liability of the plaintiff to pay the mortgaged amount for the share that she got from her mother i.e. 11/144 shares; that both the Courts ordered 43/144 shares for the plaintiff; that out of the above 43/144 shares, proportionately, the plaintiff has to pay 11/144 shares; that the reason assigned by the lower Courts so far as the plaintiff's share is concerned is that she need not have to be a party, but from out of the share that she got from her mother, she has to pay 1 1/144 shares; that there had been an earlier suit in O.S.No.368 of 19 78 on the file of the Court of Subordinate Judge, Tirunelveli filed by one Arunagiri Nadar wherein the plaintiff's share in the suit property was left out but her mother's share was included and therefore the lower Courts say that so far as the plaintiff's share is concerned i.e. from 43/144 shares, she must bear the proportionate 11/144 shares; that in the suit in O.S.No.368/1978 filed by Arunagiri Nadar, the share of the appellant/plaintiff has been excluded from the preliminary decree on ground that she being a minor, her property could not be brought for sale.

8. The learned counsel resuming his argument would further submit that the only issue to be decided is what is the effect of the earlier judgment in O.S.No.368 of 1978; that there cannot be any liability on the said suit at all; that the issue regarding this aspect is that she is not liable to pay the debt; that secondly, certain amounts have already been paid by the said plaintiff Arunagiri Nadar and on those reasons, the Courts observed that so far as the share of the 6th defendant in O.S.No.368 of 1978 is concerned,

which was not appealed against, the plaintiff in the suit was declared not entitled to proceed against the share of the 6th defendant to the suit. The learned counsel would also cite a judgment of Privy Council rendered in SHAH RAM CHAND vs. PANDIT PARBHU DAYAL AND OTHERS reported in (1942) II MLJ 3 90 wherein it has been held:

"Where the property mortgaged belongs to, or after the mortgage becomes the property of, several persons as owners of different parts and the mortgagee releases one part or permits the owner of one part to redeem his part separately upon payment of a portion of the mortgage debt, the balance due remains charged as a whole upon all the rest of the mortgaged property and unless the mortgagee has acquired the share of a mortgagor, the other mortgagors cannot claim, independently of agreement, to have an equity to redeem their own share on payment of a proportionate part of the mortgage money. The right of redemption is a right given by section 60 of the Transfer of Property Act and not a form of relief to be given on such terms as the Court may consider equitable.
The release does not take away as regards that part the liability to contribute which Section 82 of the Transfer of Property Act imposes on the different parts."

On such arguments, the learned counsel for the appellant would pray to allow the above second appeal.

9. On the contrary, the learned counsel appearing on behalf of the third respondent, citing the genealogy tree would trace the facts and events from the origin and would ascertain that anyone inheriting any property, he or she, shall take over the same, subject only to the liability that the share has to be pay to the mortgagor and only thereafter shall take his or her share from out of the remaining property; that the two questions raised on the part of the appellants are vague; that the question of res judicata has not been decided by the lower Courts and therefore it has become incumbent on the part of this Court to decide the substantial questions of law based on these two questions clearing the debts of the mortgagee and on such arguments would pray to dismiss the appeal.
10. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, if this Court has to answer the two substantial questions of law raised on the part of the appellants, the first one regarding the error of law alleged to have been committed by the Courts below pertaining to the estoppel of parties from subjecting the plaintiff's share liable for discharge of proportionate mortgage debt, this Court has to fully rely upon the judgment of the Privy Council cited on the part of the appellant reported in (1942) II MLJ 390, wherein it is held that unless the mortgagee acquire the share of mortgagor, the other mortgagors cannot claim independently of agreement to have an equity to redeem their own share on payment of a proportionate part of the mortgage money and that the right of redemption is a right given by Section 60 of the Transfer of Property Act and not a form of relief to be given on such terms as the Court may consider equitable. Therefore, adhering to the above judgment and further if we probe into the circumstances under which both the Courts below have held that only segregating the mortgage debt, the plaintiff would

be allotted her share from out of the remaining share of the property in a partition suit which is not in tune with the legal convictions and propositions, it comes to be known that the mortgagee had, in fact, filed a suit in O.S.No.368 of 1978 to which neither the plaintiff was a party nor her share got included in the E.P.No.154/1987. Therefore, it cannot be argued that the other sharers could seek for the mortgage debt to be recovered from out of the share allotted to the plaintiff as though the plaintiff was a party to the mortgage or admitted the mortgage debt so as to recover from her share at the behest of the defendants. At this juncture, the point that is to be considered is that a mortgage could be created only on a particular property and the mortgagee is only entitled to recover the said amount only from the property which has been pledged as a security for the mortgage amount, since being a secured debt by bringing that particular property which has been mortgaged for sale and therefore the defendants are only estopped from subjecting the plaintiff's share liable for the discharge of the proportionate mortgage debt. This substantial question of law, therefore, is decided in favour of the appellant/plaintiff and against the respondents/defendants.

11. Coming to the second substantial question of law,
`whether the mortgage decree holder is prevented from claiming any share from the decree amount by the principle of res judicata in view of the decree passed in O.S.No.368 of 1978 and by include plaintiff's share in E.P.No.154/1987 and whether the Courts below have committed the error of law',
as already mentioned while settling the first substantial question of law, the mortgage debt, since being a secured debt wherein a particular property is pledged, it is up to the mortgagee to proceed against that particular property alone which is the subject matter of mortgage and therefore the defendants cannot go out of the way and propose to segregate a portion of the share of the plaintiff at the time of partition and hence when the suit was filed and the E.P. proceeding was taken pursuant to the decree said to have been obtained in the suit in O.S.No.156/1978, by the mortgagee stands apart, it must be mentioned that the defendants cannot substitute anything to the decree or the E.P. proceeding and therefore by acting on the plea taken on the part of the defendants that a portion of the property from out of the share of the plaintiff should be segregated for the mortgage debt and deciding the suit for partition based on such irrelevant and unconnected considerations, the lower Courts have definitely committed an error of law in failing to hold that in a suit for partition, wherein the mortgage decree holder is not a party, no interludes could be made and the one arrived at by the lower Courts regarding the mortgage debts is wholly in excess of the jurisdiction of the lowers Courts nor could it be said that the principles of res judicata operate in view of the decree passed in O.S.No.368 of 1978 and omission to include the plaintiff's share in E.P.No.154/1987 pertaining to which the plaintiff was not at all a party and in these circumstances, no question of res judicata will arise and hence this substantial question of law should also be answered in favour of the plaintiff and against the respondents/defendants.

12. For all the discussions held as above, this Court could
only arrive at the conclusion to allow the above second appeal.
In result,
(i) the above Second Appeal succeeds and the same is allowed.

(ii) The judgment and decree dated 4.10.1989 rendered in O.S.No.90 of 1987 by the Court of I Additional District Judge, Tirunelveli thereby confirming the judgment and decree dated 9.1.1987 rendered in O.S. No.57 of 1984 by the Court of Principal Subordinate Judge, Tirunelveli is hereby set aside insofar as they impose a condition that the appellant/plaintiff should discharge 11/144 shares of the mortgage debt in favour of one Arunagiri Nadar is concerned.
(iii) Regarding the other decisions arrived at by the Courts below, the judgments and decrees of the Courts below are hereby confirmed.
(iv) The suit in O.S.No.57 of 1984 on the file of the Court of Principal Subordinate Judge, Tirunelveli is decreed as prayed for.
However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet: Yes
Ra/Rao

To

1.The I Additional District Judge,
Tirunelveli.

2.The Principal Subordinate Judge,
Tirunelveli.

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